

**FILED**

**SEP 07 2005**

**CATHY A. CATTERSON, CLERK**  
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERONIMO VALENCIA-GARCIA,

Defendant - Appellant.

No. 03-30426

D.C. No. CR-03-06007-FVS

ORDER and MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of Washington  
Fred L. Van Sickle, Chief Judge, Presiding

Submitted June 15, 2004\*\*

Before: LEAVY, THOMAS, and FISHER, Circuit Judges.

Appellant's motion for an extension of time to file a petition for rehearing is granted. The Clerk shall file the petition for panel rehearing and petition for rehearing en banc received on July 19, 2004.

The panel has voted to deny the petition for panel rehearing.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appellant's motion for remand is granted. The Memorandum Disposition filed on June 28, 2004, is WITHDRAWN and replaced with the following Memorandum Disposition:

Jeronimo Valencia-Garcia appeals the 46-month sentence imposed by the district court following his guilty-plea conviction for being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we remand for further proceedings.

The Sentencing Guidelines are no longer mandatory and we cannot determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. *See United States v. Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc). On remand, therefore, the district court should consider in its discretion appellant's sentence in light of *Ameline*.

We decline to reach Valencia-Garcia's ineffective assistance of counsel claim on direct review. *See United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003).

**REMANDED.**